

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
Second Application by BellSouth Corporation,)
BellSouth Telecommunications, Inc. and BellSouth)
Long Distance, Inc. For Provision of In-Region)
InterLATA Services in Louisiana)

CC Docket No. 98-121

**KMC TELECOM INC.'S OPPOSITION TO BELL SOUTH'S
PETITION FOR RECONSIDERATION AND CLARIFICATION**

KMC Telecom Inc. ("KMC"), through undersigned counsel, hereby opposes BellSouth's Petition For Reconsideration and Clarification of the Commission's October 13, 1998 *Memorandum Opinion and Order* ("Order"), FCC 98-271, denying its second application for in-region interLATA authority in Louisiana. None of the issues raised by BellSouth warrant reconsideration or clarification. BellSouth has failed to demonstrate that the Commission's *Order* contains factual or legal errors. For this reason, the Commission should deny BellSouth's Petition.¹

**I. THE COMMISSION CORRECTLY FOUND THAT PCS IS NOT
YET A COMMERCIAL ALTERNATIVE TO WIRELINE SERVICE**

The Commission properly concluded that BellSouth could not rely on the presence of PCS providers in the Louisiana market to satisfy Track A of Section 271 of the Telecommunications Act of 1996, 47 U.S.C. § 271(c)(1)(A). After thoroughly analyzing

¹ KMC's failure to address each of the eight broad issues on which BellSouth seeks reconsideration and/or clarification should not be construed as support for BellSouth's Petition. KMC has limited its opposition to the issues in which it has the greatest interest.

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BellSouth's evidence -- a market research study performed by M/A/R/C, an economic study performed by National Economic Research Associates ("NERA") and advertisements for AT&T's Digital One Rate Plan -- the Commission determined that BellSouth had failed to demonstrate that consumers in Louisiana actually substitute PCS service for traditional wireline service.

The M/A/R/C study reported the results of interviews with 202 PCS users in New Orleans. (BellSouth Petition at 3.) From these 200 interviews, BellSouth extrapolated that approximately 2,100 Louisiana residents subscribed to PCS instead of wireline as their only service and that another 1,750 residents had replaced their wireline service with PCS. *Order*, ¶36. The Commission found that the M/A/R/C study was fundamentally flawed for three primary reasons: (1) the sample group was not randomly selected and was not shown to be representative of PCS users in Louisiana or even those in New Orleans; (2) the study contained no statistical analysis to support BellSouth's inferences concerning the statewide PCS user population and (3) the study disguises the complementary nature of PCS service. *Order* at ¶35.

In seeking reconsideration, BellSouth argues that even if the survey results were relevant only to New Orleans, the study still shows that PCS actually competes with wireline service. Like the M/A/R/C study, BellSouth's argument is flawed. It also misconstrues and fails to address the fundamental bases for the Commission's criticisms of the study.

Contrary to BellSouth's suggestion, the Commission did not impose a geographic scope requirement to the showing that a BOC must make under Track A. Rather, the Commission found that the study's sampling deficiencies render unreliable BellSouth's own attempt to extrapolate the survey results to the general PCS user population (*Order*, at ¶37), a finding that

BellSouth does not contest. Nor does BellSouth challenge the Commission's finding that the survey data lacks statistical significance. Thus, BellSouth has not shown that the Commission erred in rejecting the M/A/R/C study as persuasive evidence that PCS is a commercial alternative to wireline service.

BellSouth's efforts to rehabilitate the NERA study are similarly unavailing. In defending the NERA study, BellSouth argues that a "BOC relying on PCS substitution to comply with Track A need only demonstrate that substitution is taking place, not that a particular number of consumers has substituted (or would be expected to substitute) the two services." (BellSouth Petition at 4.) The NERA study, however, does not show that substitution is actually taking place, nor did BellSouth offer the study for that purpose. On the contrary, BellSouth offered the NERA study to show that "[a]t today's current prices . . . as many as 7 to 15% of BellSouth's local residential customers in New Orleans *could consider switching* to PCS PrimeCo on price grounds alone." *Order*, ¶40 (emphasis added.) The Commission properly found that the NERA study did not demonstrate that residential customers in New Orleans would consider switching to PCS on the basis of price alone. *Id.* at ¶41. Having offered the study for the purpose of convincing the Commission that PCS is priced comparably to wireline service for a certain percentage of residential customers, BellSouth is in no position to complain that it is not required to make such a showing to demonstrate that PCS is a commercial alternative to wireline service.

Finally, the Commission properly found that while AT&T's advertisements for the Digital One Rate Plan may be intended to persuade customers to substitute PCS for wireline service, BellSouth produced no evidence that its local customers are likely to discontinue their

wireline service in favor of AT&T's PCS service. *Order*, at ¶43. BellSouth does not dispute that it failed to produce any evidence that its customers were substituting AT&T's PCS service for their wireline service. Instead, it argues that AT&T's advertisements somehow conclusively demonstrate that the Digital One Rate Plan is a viable substitute for wireline service. (BellSouth Petition at 5.) BellSouth cannot seriously contend that it meets its burden under Track A simply by producing copies of advertisements, with no showing that the advertisements have been successful in swaying customers to substitute AT&T's PCS service for BellSouth's wireline service.

II. THE COMMISSION PROPERLY FOUND THAT BELL SOUTH'S OSS IS STILL INADEQUATE TO MEET THE CHECKLIST.

In rejecting BellSouth's application, the Commission found that BellSouth's average installation intervals for resale service are significantly longer than the average installation intervals for its own retail service. Based on this disparity, the Commission properly concluded that BellSouth is not providing competing carriers nondiscriminatory access to its operation support systems ("OSS"). *Order*, at ¶126. BellSouth contends that the Commission should reconsider this conclusion because provisioning is not properly a part of the OSS analysis. (BellSouth Petition at 6.)

Again, BellSouth is mistaken. The manner in which BellSouth executes its competitors' resale orders is most definitely encompassed within the definition of OSS. Section 1.319 of the Commission's rules, 47 C.F.R. §51.319(f), defines OSS as "functions consist[ing] of pre-ordering, ordering, *provisioning*, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information" (emphasis added). *See also Application of*

BellSouth Corporation , et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana, 13 FCC Rcd 6245, at ¶22 (1998) (OSS includes “functions for the . . . *provisioning* of resale services”) (emphasis added). Provisioning is defined as the exchange of information between carriers “where one *executes a request* for a set of products and services . . . from the other with attendant acknowledgments and status reports.” 47 C.F.R. §51.5 (emphasis added). Thus, there is no merit to BellSouth’s claim that the Commission inappropriately drew conclusions regarding its OSS functions from provisioning data.

III. THE ACT SPECIFICALLY GRANTS THE COMMISSION PRICING AUTHORITY OVER NUMBER PORTABILITY

The Commission correctly concluded that BellSouth is engaging in practices that conflict with the Commission’s interim number portability pricing rules and competitive neutrality guidelines. *Order*, at ¶ 289. BellSouth challenges this conclusion on the grounds that the Commission lacks authority to inquire into interim number portability pricing practices approved by the Louisiana Commission. (BellSouth Petition at 14-15.)

BellSouth’s argument is contrary to the plain language of the Act. Section 251(b)(2) of the Act imposes on all local exchange carriers the duty to provide “number portability in accordance with requirements prescribed by the Commission.” Section 251(e)(2) expressly vests the Commission with jurisdiction over number portability pricing. That section provides that the “cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis *as determined by the Commission*” (emphasis added). Congress could not have been any more specific in granting the Commission jurisdiction to determine what

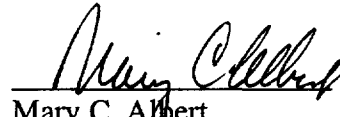
the costs of number portability are and how those costs will be recovered.

Moreover, nothing in the Eighth Circuit's decision can be construed as depriving the Commission of jurisdiction over number portability pricing. Although the Eighth Circuit held that the Commission did not have jurisdiction to issue rules relating to the pricing of interconnection, unbundled elements, resale and transport and termination of traffic, it was forced to acknowledge that "Congress expressly called for the FCC's involvement" in promulgating rules under Sections 251(b)(2) and 251(e). *Iowa Utilities Board v. FCC*, 120 F.3d 753, 794 (8th Cir. 1997). The Court in no way suggested, as BellSouth implies, that the Commission must cede its express statutory authority over number portability to the States.

CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's Petition For Reconsideration and Clarification.

Respectfully submitted,



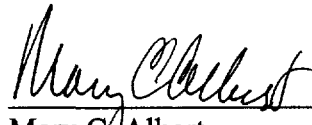
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Dated: November 25, 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing KMC Telecom Inc.'s Opposition to Bellsouth's Petition for Reconsideration and Clarification were served on the following by First Class Mail, postage prepaid, this 25th day of November 1998.



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